

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

CONSTANCE SPINOZZI, on behalf of a)	
others similarly situated,)	
)
Plaintiff,)	
)
) 3:08CV229
) FEBRUARY 5, 2009
vs)	
)
LENDINGTREE, LLC; NEWPORT LENDING)	
CORP; SOUTHERN CALIFORNIA)	
MARKETING CORP; HOME LOAN)	
CONSULTANTS, INC.; and SAGE CREDIT)	
COMPANY,)	
)
Defendants.)	
	/

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE FRANK D. WHITNEY
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR PLAINTIFF

GARY W JACKSON, ESQ.
Jackson & McGee, LLP
521 East Boulevard
Charlotte, NC 29203

TRACY D. REZVANI, ESQ.
Finkelstein Thompson LLP
1050 30th Street, N.W.
Washington, DC 20007

CHRISTINE M. FORD, ESQ.
Meiselman, Denlea, Packman,
Carton & Eberz, PC
1311 Mamaroneck Avenue
White Plains, NY 10605

APPEARANCES CONTINUED:

FOR DEFENDANTS

MARK S. MELODIA, ESQ.
Reed Smith LLP
136 Main Street
Princeton, NJ 08540

ROBERT E. HARRINGTON, ESQ.
JONATHAN C. KRISKO, ESQ.
Robinson, Bradshaw & Hinson, P.A.
101 N. Tryon Street
Charlotte, NC 28246

ALSO PRESENT: SCOTT CAMMARN

General Counsel, LendingTree

* * *

Proceedings reported and transcript prepared by

JOY KELLY, RPR, CRR
U. S. Official Court Reporter
Charlotte, North Carolina
704-350-7495

1 (Call to Order of the Court at 9:00 a.m.)

2 THE COURT: Good morning.

3 We're here in the case of Spinozzi et al v.
4 LendingTree, LLC, et al. 308, md, for multidistrict, 1976,
5 on a pretrial motion of the defendant LendingTree to state
6 its action and compel arbitration.

7 Let me first thank Dean Stone and the Charlotte
8 School of Law for allowing us to use this courtroom this
9 morning. I understand this is the first time federal court
10 has been held here at the Charlotte School of Law, and I
11 hope it's not the last.

12 On behalf of Chief J. Robert Conrad and the rest
13 of the members of the Western District I hope we can
14 continue to have interesting and educational proceedings
15 here at the law school that will benefit the students and
16 give them a practical understanding of litigation.

17 I also want to thank Inspector Clarence Strahan
18 and the U. S. Marshal Service for providing judicial
19 security. I think that gives the students a real
20 understanding of what you have to do to enter into a federal
21 or state courthouse since 9/11 and even before.

22 I also want to thank my staff, the deputy clerk of
23 court, Candace Cochran, and the court reporter, Joy Kelly,
24 who had to logistically relocate and set up shop here for
25 this morning's proceeding.

1 And I especially want to thank my judicial law
2 clerk, Mr. Baker, over to my left, and my extern and your
3 fellow student, Megan Nicholson, who spent so much time
4 doing the liaison work in setting up this hearing.

5 Now, before we begin, I would like speak to the
6 students for a moment and give you a little background
7 behind the case.

8 We looked for a case that would be educational and
9 that would raise interesting issues of federal
10 jurisprudence. What appears to you as one case is actually
11 nine different cases that have been consolidated for
12 pretrial proceedings.

13 As you are no doubt are aware, one of the biggest
14 problems faced by the federal court system is the increased
15 congestion of our dockets, which in turn causes justice,
16 both criminal and civil cases, to be delayed. I've always
17 believed there's a great deal of truth to the old adage
18 justice delayed is justice denied.

19 According to the national averages in 2007 it took
20 a civil case over two years to get from filing to trial.
21 Therefore, there is a manifest need for increased efficiency
22 in the federal court system. Well, back in 1968 Congress
23 passed, or rather enacted 28 U.S.C., Section 1407, creating
24 the judicial panel of multidistrict litigation.

25 Under Section 1407 the panel has the authority to

1 order the transfer of civil actions involving one or more
2 questions of -- common questions of fact or laws to a single
3 district court. That court will then conduct pretrial
4 proceedings for all of the cases rather than having them
5 processed piecemeal across the country. In this way the
6 parties in the course avoid duplicative discovery,
7 conflicting rules, and the overall cost of litigation is
8 reduced.

9 At or near the conclusion of the pretrial
10 proceedings the cases -- assuming cases have not been
11 resolved, the panel will order the cases back to their
12 original districts so the original district judge, the
13 transferor court, tries the case.

14 In the instant case the first plaintiff filed here
15 in the Western District of North Carolina, then moved for
16 pretrial proceedings in all other related cases to be
17 consolidated here. Defendant LendingTree supported that
18 motion, as did other plaintiffs, but some plaintiffs argued
19 for other locations, such as the Northern District of
20 Illinois and the Southern District of California.

21 The panel found there were common questions of
22 fact and then found that centralization would serve the
23 convenience of the parties and witnesses, and would promote
24 judicial efficiency.

25 The chief judge of the panel called me up in

1 November and wished me a Merry Christmas and gave me the
2 Christmas gift of being the designated judge who would hold
3 the pretrial proceedings for all of these matters. The
4 panel, therefore, of course, granted the motion and
5 transferred the cases to this district because, one,
6 LendingTree, the primary defendant, is located here and
7 parties, witnesses and documents could be found here.

8 And secondly, this district currently has the
9 docket capacity to handle a consolidated case, which is a
10 little unusual for the history of this district. Up until
11 just a few years ago our district was backlogged with cases.
12 But because we have actually three new district judges over
13 the last three-and-a-half years, we have been able to catch
14 up, and we're now have less of a docket, less crowded docket
15 than most districts.

16 By way of factual background, I'm sure you're all
17 familiar with LendingTree and its business of assembling
18 consumer credit information and distributing that
19 information to a limited number of third-party lenders.

20 Plaintiff's allege that after providing
21 LendingTree with their personal information, Social Security
22 number, income and employment information, as well as their
23 name, address, e-mail and phone number, LendingTree
24 employees allegedly sold this information to third parties
25 in violation of LendingTree's confidentiality policies, as

1 well as the Federal Fair Credit Reporting Act. Thus
2 plaintiffs argue they have been exposed to multiple offers
3 of solicitations, credit, identity theft and other damages.

4 Defendant LendingTree contends that this court is
5 the improper forum to address any alleged violations of
6 federal law or other breaches of duty because of a binding
7 arbitration agreement contained and the terms of use that
8 were presented to plaintiffs that plaintiffs ostensibly
9 agreed to when they clicked or checked the box indicating
10 they agreed to those terms.

11 And I'm sure every student, whether in this
12 courtroom or listening to this hearing electronically, has
13 clicked the box on some terms-of-use contract on some
14 website. So every one of you should understand the factual
15 context of this case.

16 Now because plaintiffs clicked the box,
17 LendingTree argues that this case should be stayed and sent
18 to binding arbitration.

19 Now, I want to add that Congress has indicated its
20 approval of arbitration in the Federal Arbitration Act. The
21 Supreme Court has consistently upheld this policy favoring
22 arbitration, reversing lower court decisions exhibiting
23 hostility to arbitration clauses.

24 However, the Federal Arbitration Act, in its own
25 terms provides that arbitration agreements, while normally

1 valid and irrevocable, can be voided by state law revocation
2 doctrines. Plaintiffs argue at least one such doctrine, the
3 doctrine of unconscionability, applies in this case; and the
4 arbitration clause and its provision are unconscionable and,
5 therefore, unenforceable.

6 So today we're here on defendant's LendingTree
7 motion to stay all proceedings and to compel plaintiffs to
8 submit to binding arbitration.

9 Each side will have 30 minutes to argue.
10 Defendants, of course, may reserve some time since they are
11 the movants, and because the defendants are the movants,
12 they should, of course, begin first.

13 And before defendants make their argument, I would
14 ask all counsel to introduce themselves starting with the
15 plaintiffs table.

16 MR. JACKSON: Good morning, Your Honor.

17 Gary Jackson representing the plaintiffs as
18 liaison counsel and Bercaw, Winsett and Woods.

19 THE COURT: Thank you, Mr. Jackson. It's good to
20 see you again.

21 MS. REZVANI: Good morning, Your Honor.

22 Tracy Rezvani of Finkelstein Thompson. I'm
23 counsel for Bercaw, Winsett and Woods. However, I'm
24 authorized to speak on behalf of all the plaintiffs which
25 includes Miller, Bradley, Garcia and Shaver.

1 THE COURT: Thank you, Ms. Rezvani -- Rezvani,
2 right?

3 MS. REZVANI: Rezvani.

4 THE COURT: And I'd ask you, if you could, to move
5 so you can get close to the mike.

6 MS. REZVANI: I will, Your Honor.

7 MS. FORD: Good morning, Your Honor.

8 Christine Ford of Meiselman, Denlea, Packman,
9 Carton & Eberz. I'm here on behalf of the Garcia and
10 Bradley plaintiffs.

11 THE COURT: Thank you, Ms. Ford. The defendant.

12 MR. HARRINGTON: Good morning, Your Honor.

13 Rob Harrington of Robinson Bradshaw here in
14 Charlotte. I'm here with the Jon Krisko from my office, and
15 Scott Cammaran who is general counsel of LendingTree.

16 MR. MELODIA: Good morning, Your Honor. Good to
17 see you again.

18 Mark Melodia from Reed Smith.

19 THE COURT: Yes, Mr. Melodia, it's good to see
20 you.

21 MR. MELODIA: Also here for LendingTree, LLC.

22 THE COURT: And you are starting. Would you like
23 to reserve some time?

24 MR. MELODIA: I would, Your Honor. I'd like to
25 actually reserve ten of my 30 minutes, if I could.

1 THE COURT: That's fine. Mr. Baker, help me on
2 that. Go ahead.

3 MR. MELODIA: The argument is pretty straight
4 forward from our point of view, and has a bit of the
5 groundhog day about it. We're a few days after groundhog
6 day, but the weather reminds us we probably do have six more
7 weeks of winter, and I'm thinking more the movie in which
8 the character kept doing the same thing again and again and
9 expecting a different result.

10 THE COURT: I understand the implication of your
11 argument, but we have new legal arguments today that were
12 not presented at the original Spinozzi hearing.

13 MR. MELODIA: There are some new arguments,
14 although they are ultimately unavailing for plaintiffs and
15 shouldn't change this Court's decision.

16 What the plaintiffs here are arguing for is for
17 this court to essentially reverse itself and its ruling of
18 August 21st when Your Honor previously decided, in the
19 Spinozzi, Carson and Mitchell matters, prior to the MDL
20 having been granted, that those plaintiffs would be
21 compelled to individually go to arbitration, consistent with
22 the Terms of Use Agreement that they agreed to and Your
23 Honor found to be valid, irrevocable and enforceable on its
24 terms as provided for under the FAA, and Your Honor also
25 applied the North Carolina Supreme Court decision, now a

1 year old, the *Tillman* case. That was August.

2 THE COURT: They now argue, though, that we should
3 be here under California law, and then the *Tillman* case
4 wouldn't apply.

5 MR. MELODIA: They do, Your Honor. That goes to
6 the second point they would ask Your Honor to revisit or
7 reverse, which is the panel you referred to a few minutes,
8 the MDL panel's decision to send this case to North
9 Carolina.

10 The MDL panel did not decide it -- and I'm not
11 suggesting it did -- the enforceability of the venue clause
12 per se. However, the MDL panel did decide to send this case
13 to North Carolina, and specifically to Your Honor by name as
14 you have suggested, with at least the courtesy of a phone
15 call ahead of time. And they did that, Your Honor, in
16 October. They did that knowing that Your Honor had already
17 ruled in August on this very issue, in these very cases,
18 under this same agreement, with the same basic allegations
19 at issue, with class members in presumably the same class.

20 THE COURT: I agree they had knowledge of this
21 Court's ruling. But in my discussion with the chief judge
22 there was never any discussion about how I should rule in
23 the future. It was just awareness that I was abreast of the
24 case, and that I was moving my docket along.

25 MR. MELODIA: Absolutely. I don't mean to suggest

1 that there was any prejudgment by anybody other than the
2 Court was aware that result had already occurred, and sent
3 the case here, under the MDL rules, which as Your Honor
4 summarized earlier, require a just decision and a efficient
5 decision and a decision that is consistent in pretrial
6 rulings.

7 Obviously, if there are distinctions that matter,
8 then there doesn't need to be a consistent decision. But
9 one of goals of the MDL process is on its face, and one of
10 the rulings by the panel sending these cases to you, was
11 looking for consistency in pretrial rulings across cases the
12 plaintiffs themselves put forward to the MDL panel and are
13 putting forward to you, Your Honor, as a class, a single
14 class, as consistent cases that involve core common legal
15 issues.

16 What's more common and core and threshold in a
17 case than where it's going to be decided and what law should
18 apply? That is about as core and common an issue as -- you
19 know, when you're dealing with a class like this -- as you
20 can get. So --

21 THE COURT: When you say where it's going to be
22 decided, are you talking about venue or are you talking
23 about choice of law?

24 MR. MELODIA: Both, Your Honor.

25 THE COURT: Because they are very different. I

1 have venue only for pretrial motions. I don't have venue
2 over the trial.

3 MR. MELODIA: That's absolutely true. It will go
4 back, as you said, to the transferor court. However, when
5 pretrial motions like this one seeking the enforcement of a
6 written contract that you previously found to be enforceable
7 and involving no procedural unconscionability and no
8 substantive unconscionability --

9 THE COURT: I believe I found there were a couple
10 terms of procedural unconscionability I found for the
11 plaintiffs. Certainly that there's not an equal bargaining
12 position in that contract.

13 MR. MELODIA: Absolutely. Out of the three
14 factors that go under *Tillman* and generally under the
15 unconscionability analysis, we freely admitted in August,
16 and we do again, that obviously there is not equal
17 bargaining power, and this is a contract of adhesion.
18 That's, of course, the beginning of the analysis, not the
19 end of it as Your Honor found correctly in August.

20 So what do we have today? Sort of faced with two
21 sound and well thought out decisions from, Your Honor, and
22 from the panel --

23 THE COURT: That's very nice of you to say that.
24 Self-congratulatory. (Laughter)

25 MR. MELODIA: When the panel went through its

1 decision-making and it heard argument, by the way at Harvard
2 Law School -- I don't know what it is about this case, I
3 haven't been in moot court in 20 years and I've found myself
4 at two different law schools in this case.

5 THE COURT: This is a fascinating case. Rarely
6 does concepts of choice of law and unconscionability becomes
7 so critical and one might argue that it's determinative as
8 to choice of law. I'm sure that's what you might be
9 thinking, and that's probably what plaintiffs are thinking.

10 MR. MELODIA: It certainly seems to be what they
11 are thinking. We believe we can prevail under either set of
12 laws. They probably will make that same argument. We both
13 agree the choice of law is critical and there are very
14 interesting issues.

15 At the oral argument at Harvard, which is the
16 first time the MDL panel had ever sat outside of the federal
17 courthouse, and in that argument we heard from these same
18 plaintiffs lawyers the argument that California ought to be
19 where these cases are sent. California ought to be hearing
20 these issues. That California was the real locus of
21 activity.

22 THE COURT: There are defendants out there that,
23 of course, aren't in appearance today.

24 MR. MELODIA: There are defendants, Your Honor,
25 who have not appeared at all in the past nine months in

1 these cases.

2 THE COURT: Right.

3 MR. MELODIA: Who have seemingly not been either
4 served or appeared, I'm not sure which, or both -- but in
5 any case, as you correctly summarized earlier,
6 LendingTree, LLC is the primary defendant. And most
7 importantly for purposes of the terms of use, the TOU in the
8 arbitration agreement, it's the only defendant that has that
9 agreement. And it's the only defendant that had the
10 information of the people involved here, the class members.
11 The breach occurred here in Mecklenburg County.

12 THE COURT: They might argue it occurred wherever
13 the user clicked. So when you're sitting at your home
14 office, you clicked, and that's the locus of the contract.

15 MR. MELODIA: Well, even if they made that
16 argument, which they really haven't, Your Honor -- if they
17 made that argument, in fact, of course, the key point here
18 is not a single plaintiff, not one, is from California. Not
19 one. So if they make that argument --

20 THE COURT: That is not past the Court's
21 knowledge. The Court was aware there were no plaintiffs --

22 MR. MELODIA: That's not helpful to them either.

23 But faced with these two solid decisions already
24 in this case, the plaintiffs lawyers here have done what I
25 guess every law student by now has figured out you do when

1 you're faced with a question you don't know the answer to
2 from your law professor, the three Ds: You distinguish, you
3 distract, and you delay. And that's what we have. We
4 have --

5 THE COURT: Well, they are making another
6 argument. They are making an equitable argument that is --
7 they are the small guy. And if they are going into binding
8 arbitration with a class action waiver, then they just can't
9 financially litigate. And they have a federal statute that
10 they are trying to enforce. Congress has certainly given
11 them the legal authority to enforce their rights, but they
12 have -- de facto they lose their statutory rights because
13 it's just economically impossible.

14 MR. MELODIA: Right. That is one of distinctions
15 they try to draw from the August argument.

16 THE COURT: That's true. Isn't it awfully hard
17 for them to have a financially meaningful day in single
18 arbitration versus class arbitration?

19 MR. MELODIA: Well, Your Honor, not at all if they
20 have a meritorious claim and if they have damage.

21 So should we encourage, and does the law, and does
22 Supreme Court today encourage any class action to go
23 forward? Clearly not. The *Twombly* decision, among a lot of
24 others recently, indicate that's not at all the view of the
25 U. S. Supreme Court.

1 THE COURT: And I think Congress a few years ago,
2 you know, acted to narrow the state jurisdiction over larger
3 class actions also.

4 MR. MELODIA: That's correct, Your Honor. Under
5 the Class Action Fairness Act that is what occurred; and, in
6 fact, each one of these cases is brought under the Class
7 Action Fairness Act.

8 So, in fact, while, of course, there's a policy to
9 encourage class actions where they are meritorious and where
10 they can truly do justice, this is not such a situation
11 because, number one, there are no damages.

12 Your Honor mentioned identity theft in the
13 summation earlier.

14 THE COURT: There's no showing of that.

15 MR. MELODIA: There's not an allegation of it,
16 Your Honor, forget a showing. I understand we're at an
17 early stage in this case. There's no allegation of identity
18 theft. There's no allegation of unauthorized account
19 access.

20 So if they would have trouble finding a lawyer to
21 take their individual case, perhaps it's because that case
22 doesn't have merit and can't be brought in federal court.
23 That's an argument for another day in terms of the lack of
24 standing and subject matter jurisdiction under 12(b)1.

25 THE COURT: Let me ask you very quickly, under

1 their statutory remedies of \$1,000 per instance, right?

2 MR. MELODIA: Correct.

3 THE COURT: How do you define that? Do you define
4 that as one instance of misappropriation by the employee, or
5 is it every single third party that received that is a
6 single instance; so if ten of them received it, then there
7 would be \$10,000 --

8 MR. MELODIA: There isn't any case law on that
9 issue, Your Honor. But I think the position that they are
10 taking, and will take, is that every plaintiff has the
11 ability, in terms of their information, to seek statutory
12 damages up to \$1,000 under the Fair Credit Reporting Act for
13 an intentional violation, and that's one source of potential
14 damage for them which --

15 THE COURT: Are you saying then that if it's ten
16 different third parties, it is \$10,000?

17 MR. MELODIA: Per person? I'm not expressing a
18 view on that.

19 THE COURT: You're not taking a position on that.

20 MR. MELODIA: But the point is that there are
21 statutory damages available to them.

22 THE COURT: Right.

23 MR. MELODIA: Those in no way waived or changed as
24 a result of the arbitration clause enforcement or the class
25 action waiver.

1 THE COURT: I understand that. But if your
2 position -- if your position in court or in arbitration
3 is -- is just -- one misappropriation is just \$1,000.

4 MR. MELODIA: Yeah. I don't want to get too far
5 distracted with the Fair Credit Reporting Act only, Your
6 Honor, because --

7 THE COURT: It relates to their argument of
8 unconscionability. Of course, they haven't overcome choice
9 of law. If they get to unconscionability, they are going to
10 be arguing that this is financially impossible for them to
11 have a remedy without there being class and without
12 arbitration. Even if a class action waiver applies to
13 arbitration, they got the class action waiver set aside and
14 they had class arbitration, they'd have at least a better
15 opportunity for a financial remedy, meaningful remedy.

16 MR. MELODIA: There can't be a class arbitration
17 here. That's clear from the clause. And AAA rules also do
18 not allow for class arbitration when there's a clause that
19 specifically says there shouldn't be class arbitration.

20 THE COURT: Do I interpret that or does the
21 arbitrator do that interpretation?

22 MR. MELODIA: You, Your Honor. You, Your Honor,
23 determine whether or not a class waiver is enforceable.
24 That's very clear in the law.

25 THE COURT: Well, there are even some district

1 courts that take the position I don't even determine the
2 binding arbitration clause. That an arbitrator first has to
3 determine if the binding arbitration clause is binding.

4 MR. MELODIA: I think that's the clear minority
5 and not the correct view. That's not the Supreme Court's
6 view and that's not the Fourth Circuit's view. You, Your
7 Honor, do determine the enforceable, and you, Your Honor, do
8 determine the enforceability of the class action waiver.

9 The Fair Credit Reporting Act is also an issue for
10 another day because it doesn't apply to LendingTree at all.
11 LendingTree is not a credit reporting agency, and we did not
12 furnish under that provision. But that's a merits argument,
13 I understand, to be defended later.

14 THE COURT: Well, it is, except it's not under
15 unconscionability.

16 MR. MELODIA: But Your Honor can't judge the
17 merits of the case, you know, now obviously for either side
18 in order to determine whether or not a clause is
19 unconscionable. The clause has to be judged as a threshold
20 matter without at view of the merits from the Court which
21 obviously aren't yet before the Court. Both sides will make
22 their arguments on that.

23 THE COURT: All right. Let me direct you back to
24 my threshold issue, that is choice of law.

25 MR. MELODIA: Okay.

1 THE COURT: There is strong arguing for California
2 law because their contention is that California has a
3 materially greater interest than North Carolina. And I'd
4 like you to summarize why that's not so.

5 MR. MELODIA: Certainly.

6 You know, the panel -- of course, the
7 multidistrict litigation panel was faced with those same
8 arguments, chose to send the case here. You've seen the
9 briefing on that. Your Honor has briefing in front of you,
10 as well as an affidavit from LendingTree's president which
11 sets forth in detail the ties with North Carolina.

12 You also have a verified complaint from North
13 Carolina, Mecklenburg County, which details how this
14 occurred, who did it, where they did it, and what has
15 happened since, all of which is about North Carolina.

16 None of the plaintiffs is from California. Not
17 one. None of the defendants that matter in this case, or
18 who have appeared in this case, were from California. None
19 of the parties to the arbitration contract and the terms of
20 use are from California.

21 There's no more tie to California than there is to
22 Oregon or Mississippi, and there's actually less tie than
23 there is to Oklahoma. There are two named plaintiffs from
24 Oklahoma. In fact, one of the plaintiffs in the Spinozzi
25 case, Mitchell, was from Oklahoma. And you may remember

1 that that case was transferred to you from Oklahoma.

2 Now, did we decide the issues and argue the issues
3 in August under Oklahoma law? No. Why wasn't it raised
4 then? Why wasn't the argument made that Oklahoma law should
5 have applied in August?

6 Because it was a transferred case here from
7 Oklahoma. You were the transferee court in that instance.
8 And, in fact, Mitchell was actually from Oklahoma, unlike
9 all the plaintiffs here who are arguing, "oh, you need to
10 apply California law" who aren't from California. Yes, we
11 have cases being transferred from California and one from
12 Illinois.

13 THE COURT: Four from California.

14 MR. MELODIA: You do. But the reality is that the
15 *Van Dusen* case, which they cite for the principle you must
16 apply -- you have no discretion, you must apply the
17 transferor court's state law. That would be California in
18 four instances and Illinois in one.

19 That's not at all what *Van Dusen* stands for.
20 *Van Dusen* stands for, as does all the case law since,
21 including the *Plowman* case -- which we gave to you from the
22 Eastern District of Virginia -- those cases all stand for
23 the proposition that we need to be careful of forum
24 shopping. We need to be careful of judge shopping. We need
25 to be careful not to allow people to game the system and to

1 export favorable law to their position and import it into
2 another jurisdiction. That's what *Van Dusen* was about.
3 *Van Dusen*, as we detailed in the brief, you had no choice of
4 law provision, first of all. Big distinction. The second
5 distinction --

6 THE COURT: That's probably the single-most
7 important distinction. Right?

8 MR. MELODIA: It is. But a close second, Your
9 Honor, is another distinction, which is that venue was
10 proper in the transferor court in *Van Dusen*. That is the 40
11 people who filed Pennsylvania personal injury actions were
12 Pennsylvania residents who had been damaged in the plane
13 crash. The fact that those cases then got transferred to
14 Massachusetts for determination under 1404(a), that was okay
15 because --

16 THE COURT: I understand there's no consumers from
17 California.

18 MR. MELODIA: Correct.

19 THE COURT: But some of these missing defendants
20 who are part of this alleged misconduct are residents of
21 California. So why isn't -- even if they are not here
22 today, why isn't that a proper venue for this proceeding in
23 California?

24 MR. MELODIA: Well, it isn't a proper venue in
25 terms of -- for any of the named plaintiffs. None of the

1 activity involving any of the named plaintiffs.

2 THE COURT: But the case was properly filed -- the
3 four cases were properly filed in the Central District of
4 California. Right?

5 MR. MELODIA: They were not because they violate
6 the Terms of Use Agreement, so back to your first point --

7 THE COURT: Well, are the terms of use -- both has
8 a venue and --

9 MR. MELODIA: It does.

10 THE COURT: -- violating the --

11 MR. MELODIA: Absolutely. And if you look at the
12 briefing --

13 THE COURT: Right. I understand what you're
14 saying. We've kind of got a circular argument here.

15 You're saying we're in California because we have
16 proper venue because there are some defendants that are
17 there.

18 MR. MELODIA: Right.

19 THE COURT: And in California we probably would be
20 able to set aside this choice of venue provision because the
21 contract is unconscionable. So they have to argue
22 unconscionability first --

23 MR. MELODIA: Right.

24 THE COURT: -- to show why you set aside all these
25 arguments, all your arguments of why the contract terms

1 mandate something.

2 MR. MELODIA: Yeah. Well, in fact, Your Honor
3 they wouldn't win in California. And it's interesting, a
4 case you don't have in front of you because it was just
5 decided, *Ramkissoon v. AOL*. It's a Ninth Circuit case, and
6 it's sort of in the category of be careful what you wish for
7 from the plaintiff's side.

8 In that case -- it's a privacy case, and it was a
9 class action. And the issue involved whether or not -- you
10 know, whose interests were involved. And it was a
11 tug-of-war between Virginia and California in that case.

12 In that case the Ninth Circuit was very focused on
13 where are these plaintiffs from, and can the plaintiffs
14 avail themselves of California policies and California
15 statutory rights if they are not from California?

16 It was clear from that decision that the Ninth
17 Circuit would not allow non-California plaintiffs to proceed
18 as if they were covered by the protections of California
19 consumer protection law. And that's a fundamental problem
20 for them here.

21 THE COURT: *Ramkissoon*.

22 MR. MELODIA: *Ramkissoon*, decided January 16th by
23 the Ninth Circuit.

24 THE COURT: You have used 20 minutes, just to tell
25 you if you'd like to preserve.

1 MR. MELODIA: I'd like to use a few more to wrap
2 up the basic arguments here, Your Honor.

3 Let's also remember how at least one of the cases
4 got to California. I mean, they were all a strategic
5 decision to file in California by mostly non-California
6 lawyers; lawyers from New York, DC, Illinois who chose to
7 file in California from people in Pennsylvania, Virginia,
8 Florida, New York.

9 One of the cases in particular highlights their
10 problem, Garcia. Garcia is from the Bronx. He has as
11 New York lawyer. He files in the Southern District of
12 New York. That's where the case was originally filed.

13 So when we look at *Van Dusen* and where is the case
14 originally filed and that's the transferor court, it was
15 filed in the Southern District of New York. Then it was
16 voluntarily dismissed and refiled in California, still by
17 the New York lawyer with the New York client, no California
18 client, now adding some California theories that the Ninth
19 Circuit says they can't avail themselves of anyway. And
20 which the plain language of the statute California
21 residents, California consumers, not Mr. Garcia from the
22 Bronx.

23 They want the advantage of exporting California
24 law which they view as plaintiff-friendly, and we think they
25 wouldn't win under anyway. But we think that you ought to

1 apply the terms of use just as you did before, and that is
2 North Carolina.

3 The other defendants who are, you know, in those
4 cases haven't shown up. They haven't even, you know, shown
5 up and defended in, you know, some of cases in California.
6 They sure haven't shown up here. They are not major
7 players. They are not parties to this terms of use. And
8 all they are is people who were seeking to evade the pricing
9 of LendingTree. They didn't want to pay LendingTree for the
10 leads, so they bought them, you know, from the bad
11 employees.

12 The bad employees were in North Carolina. The bad
13 employees are under federal investigation in North Carolina.
14 You know, the case that LendingTree brought against the bad
15 employees was in Mecklenburg County in April of last year in
16 North Carolina. That's the verified complaint you have in
17 front of you.

18 THE COURT: Right.

19 MR. MELODIA: The other arguments they try to
20 make, Your Honor, don't get them any further. They make an
21 argument, as you mentioned earlier, about costs.

22 They do present something they didn't in August,
23 which are some short affidavits from their clients. What
24 those affidavits tell us is that these people are almost all
25 pretty well employed, have middle incomes, and are pretty

1 well educated and have some interesting jobs, like insurance
2 examiner and a Bank of America account relations person. I
3 mean, these are not people who are unsophisticated.

4 So all the contract formation issues and issues
5 that we went through in August, which you didn't have too
6 much difficulty finding there was a valid contract, all
7 those arguments are equally valid today.

8 The fact that they say that they can't afford --
9 your point about access to the courts -- and the way that
10 sometimes courts talk about it in terms of a class action
11 waiver is an exculpatory clause; that there shouldn't be
12 exculpation through a class action waiver. You know, that
13 is pure hypothesis based upon what? I don't know if they
14 are supposed to be experts or what they are -- the two
15 attorney affidavits from the tens of thousands of lawyers in
16 North Carolina and the millions in the United States who do
17 consumer work, not to mention pro bono and other
18 organizations that do this work.

19 I mean, you know, it's what keeps law firms like
20 mine busy. There's no absence of individual cases, Your
21 Honor.

22 And just by way of example, with your permission,
23 I'd like to and up a -- you know, a complaint that I
24 happened to have in my briefcase as I was coming down.

25 This is a North Carolina State court complaint.

1 It's a privacy individual case. It is brought here in North
2 Carolina in state court, and it was filed in December
3 against another one of my clients. Not this one. It was
4 brought against Bank of America, Countrywide, for a breach
5 that they had, which is also MDL'd.

6 It also makes no allegations of harm, and it
7 doesn't even make the Fair Credit Reporting Act claim, Your
8 Honor. And yet here is a lawyer, E. Holt Moore, III, from
9 Wilmington, North Carolina, who has brought this case in
10 court and is pursuing this case against a client of mine.
11 That's just an example. But it's meant to show what we all
12 know: Anybody who is in a court every day, everybody who is
13 watching the new fillings knows these cases do get brought
14 on an individual basis.

15 And so the whole access-denied argument really is
16 a red herring. I mean, does it deny these particular
17 plaintiffs' lawyers of the expectation that they had that
18 they could make a lot of money off of this case?
19 Absolutely.

20 Does it deny their clients of access to both the
21 court's or to arbitration, which Congress has decided is a
22 just and efficient mechanism for determining disputes?
23 Final point there: The AAA rules. This is important.

24 Our clause, the terms of use under LendingTree's
25 agreement, specifically incorporates the supplemental

1 consumer rules in arbitration, in AAA arbitration. The
2 *Tillman* clause, and other clauses that have been struck
3 down, do not have that feature.

4 Tillman specifically said, "Our clause --" the
5 company involved in *Tillman* -- "trumps, supersedes any
6 contrary rule in the arbitrable forum." Our clause says
7 exactly the opposite. If it's more consumer friendly in the
8 arbitrable forum, as clearly the AAA rules are which we've
9 given to Your Honor, where the maximum that these people
10 could be out of pocket is \$125, that is not a bad forum.

11 THE COURT: Because the arbiter can allocate the
12 expenses based on size.

13 MR. MELODIA: Absolutely. And, in fact, the
14 consumer rules and principles and protocols are very clear
15 as to how that should occur and what principle should be
16 followed, and it is very consumer friendly and it is meant
17 to be.

18 And LendingTree has indicated in August in our
19 briefing, and I'll indicate again today, that we are bound
20 by, and we will follow, those rules and the decisions of the
21 arbiter regarding the way in which costs are going to be
22 incurred. And we fully recognize that the vast majority of
23 costs associated with those hearings are going to be borne
24 by LendingTree; possibly everything but \$125. None of these
25 plaintiffs have said, "I can't afford \$125." Their lawyers

1 make an argument based upon the commercial rules that do not
2 apply in this case.

3 THE COURT: Thank you. You have preserved three
4 minutes.

5 MS. REZVANI, right?

6 MS. REZVANI: And I would like to reserve a few
7 minutes to the extent we need to get to the North Carolina
8 and *Tillman* and McCawley (ph), Ms. Ford will be prepared to
9 present those.

10 THE COURT: All right. I'll give you a warning
11 like at 25 minutes?

12 MS. REZVANI: Sure.

13 I think what's important to note here is that the
14 defendants have admitted there is a burden on them, the
15 burden being two-fold: Whether the contract exists and
16 whether it's enforceable.

17 Now, I'll note that they haven't actually produced
18 the actual contract. They have produced the sample
19 contract, and they've produced a chart from records that
20 purport to say when our clients had signed this agreement.
21 Now they haven't actually produced the records, but, you
22 know --

23 THE COURT: You're saying this is not the
24 contract?

25 MS. REZVANI: That's just a template, a sample, a

1 blank one, but not the one that's actually clicked through
2 by the clients.

3 THE COURT: Not -- I mean, is there such a
4 database?

5 MS. REZVANI: Well, according to Mr. Norton there
6 are records.

7 But in any case, even if the motion is denied on
8 that basis, they can simply refile it Monday with the
9 records anew, so I'm not going to rest on that. But I just
10 want to note they haven't actually met that burden in
11 providing all the records that show that there is, in fact,
12 a contract that governs.

13 The second burden, which is is the contract
14 enforceable?

15 Now, the defendant, LendingTree, argues that the
16 contract is enforceable only if you apply North Carolina law
17 and modify it from the bench. They never once argue in
18 their papers or here in oral argument that the contract is
19 enforceable if you apply California and Illinois law. And
20 that's an important thing to note from the very beginning.

21 They rest their entire argument on choice of law
22 and *Tillman*, and so let's get to choice of law.

23 THE COURT: Well, they rest it on choice of law,
24 choice of venue, binding arbitration, and class action
25 waiver. That all of those provisions are in there, and that

1 particularly the binding arbitration, it's highlighted in
2 bold face, and it's also capitalized in another provision of
3 the Terms of Use Contract.

4 MS. REZVANI: Right. But only if Your Honor --
5 they argue that it's enforceable if Your Honor applies North
6 Carolina law and slightly modifies the contract. And
7 Ms. Ford is the one who is prepared to really get into that.

8 They are not seeking to enforce the contract as
9 written. As Mr. Melodia pointed out, they are looking to
10 abide by the consumer rules. However, the contract abides
11 by the commercial rules. And that's been held to be
12 substantively unconscionable by California and Illinois
13 courts, and we'll get into why.

14 THE COURT: Has it been held to be substantively
15 unconscionable under North Carolina?

16 MS. REZVANI: There has been no ruling on that.

17 MS. FORD: If I may, just to answer your question,
18 Your Honor, the terms of use paragraph 14 is attached to the
19 Norton Declaration say that the commercial arbitration rule
20 of the AAA will apply. The *Tillman* court addressed that
21 very argument and found that applying the consumer rules
22 would constitute a rewriting of the contract, which the
23 Court could not do. In essence, the *Tillman* court rejected
24 the very argument that Mr. Melodia just made with respect to
25 the application of the AAA consumer rules.

1 THE COURT: So it sounds to me that the argument
2 you're making is that they have to abide by the commercial
3 arbitration rules. But if this Court then holds that choice
4 of law is North Carolina, you've actually hurt your clients
5 because they have agreed to waive that --

6 MS. REZVANI: They cannot, though.

7 THE COURT: All right. Then you --

8 MS. REZVANI: We'll get into in all that when we
9 argue --

10 THE COURT: Be careful what you ask for.

11 MS. REZVANI: Now, the standard the defendant say
12 here is like summary judgment, and that is telling because
13 as Your Honor noted that in many respects, in almost every
14 respect, if a consumer claims -- small claims like these end
15 up going to arbitration, they essentially do not get filed,
16 and I think the *AmEx* court decision from the Second Circuit
17 did a pretty good job in sort of highlighting the debate.

18 THE COURT: That's an interesting decision.

19 How that does that comply with *Erie v. Tompkins*?
20 Let's just get back to basic constitutional law. I looked
21 at that decision. I went, "This is very unique."

22 MS. REZVANI: Well, *Erie* looks to state law
23 issues, and I think that *American Express* was looking at the
24 Sherman Act specifically.

25 THE COURT: Well, *Erie* says there's no such thing

1 a federal common law. There's federal general common law
2 but there's no federal common law.

3 And as I read that decision, it implies -- well,
4 there is a federal common law so long as we can craft it.
5 Because there are two statutes of Congress that might have a
6 little bit of conflict, we can thereby kind of start
7 creating own common law. Am I missing it?

8 MS. REZVANI: I'm not sure. I'm not sure.

9 THE COURT: All right.

10 MS. REZVANI: One of the things that I'd also like
11 to point out is that we can't blanketly apply Spinozzi
12 wholesale. Because as Your Honor noted, they there are
13 different plaintiffs; that come to you from a different
14 procedural posture, and there's a vastly different record
15 here.

16 The main issue here is what law to be applied.
17 And we heard a lot about the *Van Dusen* and *Van Dusen*
18 exceptions of *Ellis* and *Plowman*. And I will note that we
19 did not cite *Van Dusen* for the law of 1407, but under the
20 similar 1404 transfer statute.

21 So just to go through the three transfer statutes,
22 1404 essentially codifies forum nonconvenience. And under
23 1404, you apply the law of the transferor court and 1404 is
24 a permanent transfer. You would hear the trial. The Fourth
25 Circuit would hear any appeal.

1 The second transfer statute, 1406, essentially
2 looks to see if there's an impairment in prosecuting in the
3 original court, and is there somehow a better jurisdiction.
4 Usually it's a personal jurisdiction issue. And the
5 *Mitchell* case came to you under 1406, not '04 and not '07.
6 1406, on the other hand, requires the law of the transferee
7 court to apply. And so Your Honor didn't have a choice to
8 apply Oklahoma law to *Mitchell*. You had to apply North
9 Carolina law.

10 And the fear that Mr. Melodia mentioned about
11 forum shopping, perhaps it would apply to a 1404 transfer
12 because you'd file in one court and then try to bring your
13 law with you.

14 And so the *Ellis* and *Plowman* decisions, the
15 *Van Dusen* exceptions, have only been applied to 1404 and
16 1406, transfer decision. The defendant has not cited any
17 law that gives that exception to 1407. We've looked. We
18 cannot find it. And that's because it wouldn't make sense.

19 Now, 1407, as Your Honor noted, is a JPML
20 transfer, and they don't transfer with any sort of mindset
21 as what choice-of-law analysis the Court has to apply when
22 it gets here. Their only concern is efficiency and
23 centralization. Are there enough cases to centralize and
24 where is the best to do it.

25 THE COURT: They also look at factual issues --

1 MS. REZVANI: Factual issues as to --

2 THE COURT: -- such as where one or more of the
3 primary parties are, where the witnesses are, where the
4 documents are. And all of that also goes to the argument
5 that the defendants are making -- or the defendant,
6 LendingTree, is making -- that, you know, this is really the
7 proper situs or locus of the contract and --

8 MS. REZVANI: They don't always, and I'll give two
9 examples.

10 The CD price fixing litigation was against record
11 labels. Record labels are in New York and California. And
12 the panel sent it to me.

13 The Countrywide suit that Mr. Melodia also
14 mentioned, the connections are Delaware, New York and
15 California. It ended up in Kentucky.

16 So the panel doesn't always look to the situs.
17 They look to see what clerk of the court can handle another
18 MDL, and what judge, perhaps, is interested in the
19 litigation and can handle it efficiently. So, yes, it is a
20 factor --

21 THE COURT: I definitely agree with you that one
22 of the factors is finding a judicial officer with experience
23 in the line of cases and some level of efficiency based on
24 that court's docket.

25 MS. REZVANI: And the whole notion that just

1 because the case is here, the law of this jurisdiction has
2 to apply doesn't work. I'm a class action lawyer and,
3 believe me, I live in the MDL.

4 THE COURT: I don't think they are necessarily
5 making that argument, though, that because the MDL panel
6 sent it here, that North Carolina choice of law -- North
7 Carolina law applies. I think their argument is there's a
8 contract, and that's why the North Carolina law applies.

9 MS. REZVANI: The argument is that, well, the
10 panel was aware of the contract, and so they sent it here
11 with the mindset you would apply North Carolina, and perhaps
12 that's a distinction without much of a difference.

13 But I think the reason that the Court should apply
14 the transferor law in a 1407 case is probably -- is common
15 sense. We come here to you to go through discovery, go
16 through pretrial motions, get our experts vetted, and then
17 once we're mature, we're grown and we're educated we go
18 home.

19 THE COURT: Okay. Let me ask you this: So that
20 means I really not have one case for pretrial proceedings, I
21 have --

22 MS. REZVANI: Seven or nine cases.

23 THE COURT: I have an Illinois case, Oklahoma
24 case, a California case and a North Carolina. I have four
25 different --

1 MS. REZVANI: No, because Mitchell will not go
2 back. It's a permanent transfer. So you have four North
3 Carolina -- you have three North Carolina cases, four
4 California and one Illinois case.

5 THE COURT: So I have to really be -- I wouldn't
6 have one case, I'd have three cases.

7 MS. REZVANI: Correct.

8 THE COURT: And then they very possibly might have
9 different outcomes, and there's the state law --

10 MS. REZVANI: Believe me they do. I have had that
11 experience.

12 THE COURT: Well, I'm presuming the reason you're
13 arguing to strongly for California law is because you think
14 it's more favorable to your client than North Carolina law.

15 MS. REZVANI: We also want to preserve the system
16 that the JPML and 1407 instills.

17 And I'll give an example. If we are here and Your
18 Honor has to apply North Carolina law to shape our claims,
19 now North Carolina may have more lenient standards, and so
20 we shape our claims to the more lenient North Carolina
21 standard and then we go back to California or Illinois and
22 appear before a jury there, and now we cannot meet those
23 standards because perhaps those standards are less lenient
24 and more stringent.

25 And so it makes sense that Your Honor would have

1 to -- as the Court says, this is but a transfer of
2 courtrooms -- you have to pretend you are Judge Carny (ph)
3 in LA, and I forget the judge in Illinois -- because you are
4 essentially preparing us to go back home and present our
5 case to a jury in California and Illinois. And I liken it
6 to prep school or boarding school because we're only here to
7 grow and mature but not to stay.

8 THE COURT: But the point is that I'm supposed to
9 look at all the different states' choice of law.

10 MS. REZVANI: Correct.

11 THE COURT: And follow all the different states'
12 choice of law, at least the three states of Illinois,
13 California and North Carolina, and see which one applies
14 most to this contract or contracts.

15 MS. REZVANI: Correct. And one of the things --

16 THE COURT: But that doesn't mean that I have
17 three different cases going on at once. I still get back to
18 I look at all three -- I could have three cases, two cases
19 or one case going on at once by looking at all three states'
20 choices of law.

21 MS. REZVANI: Well, the first question is under
22 1407 you have to see which law is applied. And that's
23 substantive and choice of law. So the first part of our
24 argument is that under 1407 Your Honor must apply the choice
25 of law of statutes of California and Illinois to the cases

1 that have been transferred to you under 1407.

2 THE COURT: All right. So why does the California
3 choice of law tell me I have to apply California substantive
4 law?

5 MS. REZVANI: I will get to that.

6 THE COURT: Isn't that really key?

7 MS. REZVANI: It is. And one of the things --

8 THE COURT: Because if California actually tells
9 me to use North Carolina law, then I'm back here in North
10 Carolina.

11 MS. REZVANI: Right. Yeah.

12 One of the things that I wanted to address briefly
13 is this concept of venue. And I think we've established
14 that this venue exception, this *Van Dusen* except -- first of
15 all was for personal jurisdiction, and Countrywide can't --
16 LendingTree can't allege that we would not have had personal
17 jurisdiction over them in California. And so the question
18 Your Honor was asking --

19 THE COURT: Well, LendingTree does business in
20 California.

21 MS. REZVANI: They claim to have one of their
22 headquarters in Irvine, California, and we have that in the
23 record from their website that represents to the world that
24 we have a headquarters in Irvine.

25 The Irvine location is three times as large with

1 three times the employees. And based on anecdotal stories
2 from consumers, when they called in response to this letter,
3 they were told they were talking to someone in California.

4 Additionally, the defendants that LendingTree
5 claims were improperly joined for forum shopping are the
6 same defendants they, themselves, sued in Orange County.

7 Now, we have that also in the record. And if Your
8 Honor looks at paragraph 17 of LendingTree's complaint, they
9 claim that venue in that jurisdiction is appropriate,
10 because a) they are a California entity, and b) most of the
11 wrongful conduct occurred here. And that is something that
12 they claim to support venue for themselves in California.

13 And so the goose and gander fits good enough for
14 LendingTree for venue to be appropriate in California, why
15 isn't it good enough for the consumers who are actually
16 harmed by the wrongful conduct that they are suing under?
17 So I wanted to briefly touch on the concept of venue.

18 But now to get into choice of law, *Nedlloyd* is the
19 main case in California and it sets up a test. And the
20 first question is: Is the chosen state in the contract? Is
21 there a reasonable basis for it, a reasonable relationship?
22 And I think yes --

23 THE COURT: No. No substantial relationship.

24 MS. REZVANI: Substantial relationship or
25 reasonable basis, I think is it test.

1 THE COURT: Well, I thought it was a Restatement
2 (Second) of Conflicts that says that you apply the
3 choice-of-law provision if it's in the contract, unless
4 either the chosen state has no substantial relationship, no
5 substantial --

6 MS. REZVANI: No. The *Nedlloyd* case, it pretty
7 clearly says that it's either -- the question is does the
8 chosen state have a substantial relationship or does it have
9 a reasonable basis. If the answer is yes --

10 THE COURT: We must be reading a different
11 restatement. Because I -- you use the chosen state unless
12 the chosen state has no substantial relationship to the
13 parties or the transaction, and there's no other reasonable
14 basis.

15 MS. REZVANI: Well, they might have modified --

16 THE COURT: -- saying no substantial relationship.

17 MR. MELODIA: Section (1) (A) (7).

18 THE COURT: Section (1) (A) (7) (2).

19 MS. REZVANI: Here's the actual language from the
20 statute. "Whether the chosen state has a substantial
21 relationship to the parties or their transaction, or where
22 there is any reasonable basis for the parties' choice of
23 law. If either test is met, the Court must next determine
24 whether the chosen state's law is contrary to fundamental
25 policy of California."

1 THE COURT: And that's the Restatement (Second)
2 of --

3 MS. REZVANI: I'm reading from *Nedlloyd*. And they
4 may have slightly modified it for California. But I'm
5 reading directly from the decision. It's 3 Cal.4th 459.
6 I'm at page 465 and 466.

7 So the question then -- and we agree that there's
8 a reasonable basis for North Carolina; there is a
9 relationship here. So the question now is: Does this North
10 Carolina law, is it contrary to a fundamental policy of
11 California?

12 Now, we've cited numerous cases that in California
13 there's a fundamental policy in favor of class action,
14 especially in consumer cases, and especially when you are
15 dealing with smaller claims. And so that's why California
16 has almost universally knocked down class waivers in
17 arbitration clauses.

18 I think -- the only time I think I have seen it
19 that it has not been struck down in a commercial -- two
20 commercial parties. But when it's a consumer versus a
21 commercial entity, they are struck down.

22 So that is the fundamental public policy that
23 would be violated if California law is not applied. And I
24 would only point to *Spinozzi* as evidence that this
25 particular clause could be upheld here under North Carolina

1 law.

2 THE COURT: My concern is -- I thought I knew
3 which restatement we were dealing with. But the one that
4 I'm reading came right from the Ninth Circuit in a 2008
5 decision, and it's a very different test; dramatically
6 different test. The chosen state has no substantial
7 relationship.

8 MS. REZVANI: Yes. I'm reading from a California
9 Supreme Court opinion.

10 THE COURT: And I believe -- it's always wonderful
11 to have an externally bright law clerk -- he handed me a
12 note saying that is a paraphrasing from that opinion, and
13 it's not a direct cite of the -- a direct quote of the
14 Restatement (Second) of Conflicts of law.

15 MS. REZVANI: I will also note that the defendant
16 does not contest that a fundamental public policy of
17 California would be contravened if North Carolina law is
18 applied. The only thing that they contest is whether
19 California has a materially greater interest than North
20 Carolina.

21 *Discover Bank* and *Oestricher*, which we cite in
22 your briefs, spell out the fact that some are case-specific
23 and some are of general state interest.

24 For the case-specific ones, there are some that
25 are neutral. The place of contracting. And as Your Honor

1 noted that it's where someone is clicking on their computer.

2 THE COURT: I knew that would be your position.

3 MS. REZVANI: Right. And so that's a --

4 THE COURT: And their position I think is it's
5 where the server is. I'm not telling you what's my
6 position. I haven't decided yet.

7 MS. REZVANI: Well, I think under California law,
8 I think perhaps under an lex loci analysis, it would
9 possibly be where the server is. But I think under
10 California law it is where the person resides. And this is
11 in the 50 states. It's a neutral factor.

12 Place of negotiation is another neutral factor.
13 There was no negotiation. They've admitted it's an adhesion
14 contract. You've admitted --

15 THE COURT: It's clearly an adhesion contract.

16 MS. REZVANI: And a place of performance. Well
17 the performance is I give you information. You get me leads
18 and people call me. Well, they call me at home, so again
19 that's a neutral factor.

20 Another case-specific factor from those decisions
21 is location of the subject matter of the contract. The
22 subject matter of the contract again is information. Where
23 is the information? Well, it's in California in the hands
24 of these other defendants. And so that is a factor that
25 favors in California and not North Carolina.

1 The domicile of the parties. Well, that also
2 favors California given what we discussed about the contacts
3 with California when I briefly discussed venue, and we go
4 into it in our briefs as well.

5 Another factor where is of the place of wrong.
6 Well, the defendants who stole the data are in California.
7 But information is still hopefully maintained in California.
8 But as we learned in *Certegy*, even when these quote/unquote
9 legitimate businesses buy information, they are potentially
10 likely to sell it to less desirable elements of our society,
11 shall we say, for purposes -- for nefarious purposes.

12 THE COURT: I think that's one thing that
13 LendingTree will agree. Because the other defendants should
14 have been paying LendingTree openly for this information,
15 and they view it as information stolen from them also.

16 MS. REZVANI: And LendingTree also admits that
17 most of the wrongful conduct at issue did occur in
18 California in the complaint that they filed against these
19 defendants. So place of wrong also favors California.

20 Then there's the generally state interest.
21 California has an interest in deterring wrongful conduct by
22 its businesses.

23 THE COURT: Well, does any state not have that
24 interest?

25 MS. REZVANI: Exactly.

1 THE COURT: All 50 states want to deter wrongful
2 conduct by businessmen or business women.

3 MS. REZVANI: And all five of these businesses are
4 headquartered and have a principal place of business in
5 California. All five are not here in North Carolina.

6 THE COURT: Well, I have an interesting question
7 on that. Are they purely in default or are they actually
8 served?

9 MS. REZVANI: They were not in default. Actually
10 I wrote that down --

11 THE COURT: If they are in default, how come there
12 hasn't been a motion for default against them? Because --

13 MS. REZVANI: Because they are not in default.

14 LendingTree was served June 19th. Home Loan was
15 served June 18th; they answered 31.

16 THE COURT: Home Loan is an affiliated party.

17 MS. REZVANI: No. There's a Home Loan Consulting.

18 THE COURT: Oh, I'm sorry.

19 MS. REZVANI: They answered in California, July
20 31st. Sage was served June 18th; they answered on July
21 15th. Their counsel withdraw at the end of September. The
22 Court gave them about 30 days to find new counsel. And then
23 the cases were transferred here. And so that's the --
24 procedurally we're sort of in the middle right there.

25 Chapman's agent refused service of process. We're

1 still trying to get them served with the Secretary of State.

2 Southern California Marketing was served July 1st.

3 They did not answer the complaint but they did file a
4 response at the MDL, so now that we're here, we're going to
5 have to follow up with them.

6 Newport Lending Corp was served. However, the
7 proper defendant was Newport Lending Group, Inc. So we're
8 going to have to amend that complaint and at the end of this
9 hearing we'll address some housekeeping matters to try to
10 fix that.

11 So we're not sitting idly by. They have been
12 served, those have been answered. They've entered
13 appearance in one shape or another and so there are some
14 things we have to do to clean up the record, but we're
15 perfectly fine.

16 As far as the state's interest in deterring
17 conduct, Mr. Melodia seemed to imply that *Ramkissoo*, which
18 I think is actually *Doe v. AOL*, held that the consumer
19 statutes only applied to consumer residence. It does not
20 hold that. No California court would ever say that a
21 business incorporated or doing business within its confines
22 of the state lines can defraud people so long as the people
23 are outside of their states. The California statutes apply
24 to California businesses. California also has an
25 interest -- this is in *Discover Bank* -- has an interest in

1 protecting against superior bargaining power, and conversely
2 protecting those with inferior bargaining power. And
3 California also has an interest in adjudicating claims
4 brought under its own statutes.

5 THE COURT: All of those seem to be a concern of
6 every state sovereign.

7 MS. REZVANI: But, again, it's because we have the
8 five California defendant and not one North Carolina. I
9 think it's just -- and I hate to play the numbers game,
10 but --

11 THE COURT: Well, that's very legitimate. But we
12 do have, as LendingTree points out, we have the one
13 defendant that has an arbitration clause in a contract.
14 There are no contracts with any other defendants because
15 they are committing a tort.

16 MS. REZVANI: Well, and also they couldn't borrow
17 LendingTree's argument.

18 THE COURT: Right. I mean they can't -- their
19 torturous conduct, and there's no contract there --

20 MS. REZVANI: So arguably those are neutral
21 factors.

22 THE COURT: Right.

23 MS. REZVANI: But I think that adjudicating those
24 statutory claims brought under California law, I think
25 that's definitely in the state interest. We brought a 17200

1 claim --

2 THE COURT: But I noticed California, when it has
3 California plaintiffs and California statutory law prefers,
4 of course, choice of law for California. That makes sense.
5 But basically the California claims you're raising now are
6 not unique to California. They are -- every state has --

7 MS. REZVANI: 17200 is unique in that it has some
8 unique remedies that is not available in other
9 jurisdictions. And 1790.80 is pretty unique to California.

10 I know Mr. Melodia says that it's limited to
11 California residents. However, in *Ruiz v. Gap*, it was
12 upheld. It was my own client. He was Texas resident. And
13 in subpart 85, you can apply that out of state.

14 THE COURT: But don't North Carolina and Illinois
15 have the same concern; that they would prefer to have their
16 statutory remedies adjudicated under, you know, Illinois
17 North Carolina law?

18 MS. REZVANI: We don't bring a North Carolina UDAP
19 statute claim, though.

20 THE COURT: No. But I mean that's all part and
21 parcel of this.

22 MS. REZVANI: No. Because, Your Honor, again, you
23 would have to adjudicate the claims we bring because these
24 are the claims we have to present to the jury when we go
25 back home. So we can't rewrite the statute and say well

1 we're going to apply the North Carolina UDAP, and then go
2 back home -- and this is the situation I explained; that
3 there might be different standards between North Carolina
4 and California law. If we tee up --

5 THE COURT: Substantively I don't think anyone is
6 disputing that. It's the question of getting back to is
7 California choice of law, you know, mandate that California
8 law apply to the -- whatever number of plaintiffs in this
9 case.

10 MS. REZVANI: Yes. Yes.

11 THE COURT: That's your argument.

12 MS. REZVANI: I think the cases prove that out.
13 Because based on these factors that I outlined, California
14 does have a materially greater interest in governing the
15 claims brought under the California statutes by these
16 plaintiffs in the California court given the factors that I
17 outlined case-specific and general.

18 THE COURT: You said "these plaintiffs." But
19 where do those plaintiffs live?

20 MS. REZVANI: They do not live in California, but
21 none of the ones that filed in North Carolina are from North
22 Carolina either, so...

23 THE COURT: Well, no, but they filed here because
24 LendingTree is down the street.

25 MS. REZVANI: Well, they also filed where

1 LendingTree is in California. And that's the thing, is that
2 we need to come to terms with the fact that LendingTree
3 holds itself out to the world as having two corporate
4 headquarters: Charlotte and Irvine. So our original filing
5 in California is entirely proper, jurisdiction is
6 appropriate, venue is appropriate, and California would
7 never halt one second in applying its law to these claims in
8 California. And since you have to pretend you're Judge
9 Carny (ph), and that's the point of the analysis under
10 1407.

11 THE COURT: All right. You have used 25 minutes.
12 You can continue --

13 MS. REZVANI: I need to continue because I haven't
14 touched on Illinois and I don't want to --

15 MS. FORD: Your Honor, can we have some time to
16 address the *Tillman* factor?

17 THE COURT: You have 30 minutes, however you want
18 to use it.

19 MS. REZVANI: I'll be very quick.

20 In Illinois, the *Wigginton* decision, it's a
21 slightly laxer decision because it's a two-part test, which
22 is: Is there a reasonable basis for the chosen state? Yes.
23 And does it contravene public policy in Illinois? And like
24 California, the public policy concern is class actions being
25 able to vindicate small claims and the rights of the

1 consumers, and *Kinkel* and *Direct TV* are the cases that
2 outline that.

3 So we do have a record -- in the record case law
4 and arguments that does support the application of Illinois
5 law under the Illinois choice-of-law analysis.

6 Now, as I mentioned at the very outset,
7 LendingTree only contests that its clause is enforceable if
8 North Carolina law is applied and Spinozzi is applied
9 wholesale. And so if Your Honor holds, as I believe the law
10 requires this Court to hold, that the choice-of-law analysis
11 requires the application of California and Illinois law,
12 we're done because they've never contested that their clause
13 is enforceable under California and Illinois law. And so
14 for that I will give my five minutes to Ms. Ford.

15 THE COURT: You have three minutes.

16 MS. FORD: Your Honor, I'd like to just address if
17 the Court does apply North Carolina law, this is a very
18 different case than Spinozzi. It's not -- as LendingTree's
19 concedes in its brief, Spinozzi is not the law of the case
20 as the plaintiffs that are before you on this motion. And
21 the Garcia and Bradley plaintiffs join in all the arguments
22 that Ms. Razvani made with respect to the application of the
23 California law.

24 However, I would just like to emphasize that the
25 *Tillman* court applied a sliding scale of unconscionability.

1 And so as Your Honor mentioned earlier, you previously found
2 there were elements of procedural unconscionability that
3 were here, particularly with respect to the unequal
4 bargaining power.

5 I'd like to also just touch upon one of the other
6 elements of procedural unconscionability, and that's lack of
7 meaningful choice. And LendingTree acknowledges in their
8 brief that the plaintiffs had to click "accept."

9 THE COURT: That's -- what they argue in their
10 brief -- of course you have got to click, but they could
11 have gone on Google and looked for other loan packages. And
12 they have a lot of competitors. They would love for those
13 competitors to go away, I think, but their argument is there
14 are competitors out there.

15 MS. FORD: Right. Which Your Honor gets to the
16 point of marketplace alternatives. And there have been
17 courts, you know, in particular the *Shroyer* case out of
18 California, that say the lack -- that marketplace
19 alternatives shouldn't matter. But I just wanted to point
20 out that as established by Mr. Bennett's affidavit, which is
21 Exhibit 14 to the Bercaw plaintiff's briefs, we established
22 that there was no marketplace alternative because the
23 competitors all have arbitration clauses as well. So there
24 was no --

25 THE COURT: Well, but that's -- if enough

1 consumers said, "We don't want to --" you know, they
2 e-mailed to all these different websites and said, "You have
3 an arbitration clause. We're not going to bid with you --"
4 then I mean, isn't that -- that's why we have a marketplace,
5 isn't it?

6 MS. FORD: But, Your Honor, that gets to the fact
7 that there's no bargaining power. And these are all people
8 of modest means who, you know, are hardworking. The
9 marketplace being the Internet loan community --

10 THE COURT: It's a little paternalistic. You're
11 saying that some very sophisticated individuals -- even if
12 they're not extremely well educated, they are competent
13 individuals, weren't competent enough to make selection.

14 MS. FORD: But there's no choice. There's no
15 choice, Your Honor, because they all have the bargaining --
16 they don't have the bargaining power and all the competitors
17 have the same clause, so there is no marketplace
18 alternative.

19 And if I just could use some time to touch on the
20 substantive unconscionability elements that are here.

21 THE COURT: You have thirty-five seconds.

22 MS. FORD: One thing -- with respect to the
23 arbitration cost being prohibitively high, you have evidence
24 in the record of financial means of the plaintiffs. Their
25 average monthly income is about \$3,000 a month. They are

1 supporting children.

2 With respect to the application of the consumer
3 rules for the AAA, paragraph 14 of the terms of use
4 specifically states that the commercial arbitration rules of
5 the AAA would apply. This is very important.

6 The *Tillman* court expressly addressed this
7 argument. It's at 655 SE2d 372. The defendants made the
8 same argument, and the Court said, I have to look -- the
9 *Tillman* court said we have to look at the contract as
10 written, and it's inappropriate to rewrite an illegal or
11 unconscionable contract.

12 LendingTree's argument is based on the premise
13 that the AAA would not enforce this contract as written;
14 that rather than applying the commercial rules as stated in
15 the terms of use, they would apply the consumer rules.
16 That's not the contract that's before the Court. It's a
17 different contract.

18 Now, in addition in *Tillman* the defendants offered
19 to pay the cost of the arbitration, just as LendingTree has
20 offered to do here. And what LendingTree -- they haven't
21 really offered to pay the cost. What they said is they
22 intend to file a practical suggestion to front costs. It's
23 a meaningless promise.

24 THE COURT: Well, you know, if your clients were
25 to prevail in punitive damages, I certainly think they would

1 not want to be paying the cost.

2 MS. FORD: But, Your Honor, that gets back to the
3 terms of contract as written. Because the contract as
4 written states that the arbitrator is limited to only apply
5 actual compensatory damages and that penalties are waived.

6 THE COURT: Unconscionability is an equitable
7 concept. And when you say that *Tillman* bars a tweaking of a
8 contract to achieve equity, then it kind of turns *Tillman* on
9 its side, in my opinion. It says you can't have equity when
10 you are using an equitable principle.

11 Like I said before, you have to be careful what
12 you ask for. Because if you're mandating commercial
13 arbitration rules, you are hurting your client.

14 MS. FORD: But, Your Honor, what the Court should
15 do to protect the consumers is to look at the contract as
16 written, which is what *Tillman* says that you need to do; you
17 can't blue pencil it. And then what companies should do is
18 rewrite their arbitration clauses to include the consumer
19 rule. That's a different contract, and that's a contract
20 that's not before this court.

21 If I could make a few points --

22 THE COURT: You're two minutes over, so I was
23 generous.

24 Thank you. Thank you very much, Ms. Ford.

25 MR. MELODIA: Your Honor, I'm going to start at

1 the end. I'm going to start at the end.

2 On the AAA point. In the Exhibits G, H, I and J
3 to our reply it is very clear as pages 16 and 21 of the
4 Commercial Arbitration Rules and Mediation that, "The AAA
5 applies the supplementary procedures for consumer-related
6 disputes to arbitration clauses and agreements between
7 individual consumers and businesses where the business has a
8 standard systematic application of arbitration clauses."
9 And then it goes on.

10 In those rules, which are specifically
11 incorporated in the commercial rules, Your Honor, there is
12 where we find all of the rules that LendingTree has said,
13 both in court, in its brief, and most importantly in its
14 contract, the TOU, which specifically incorporates any
15 future changes to the AAA rules, which includes in 2003 and
16 2005 these consumers protections. That's critical.

17 The reason *Tillman* in this argument makes no sense
18 at all is, yes, the *Tillman* court did say to those defendants
19 you can't rewrite your contract because your contract,
20 defendant in *Tillman*, said that the rules -- that the terms
21 of use, the agreement in *Tillman*, governs and supersedes. As
22 I started with earlier, that's the exact opposite of our
23 contract. So it is the plaintiffs who are rewriting their
24 contract.

25 THE COURT: I understand. I've -- you've only got

1 30 seconds left, and I want to get this question answered.

2 One of Ms. Rezvani's strongest arguments is that
3 you, in your pleadings in California, say this happened in
4 California.

5 MR. MELODIA: We did not say it happened in
6 California. We said that the bad lenders who stole our
7 information and tried to get around our system operated
8 badly and committed a tort in California. That's not this
9 case.

10 THE COURT: Your employees were aware when they
11 improperly took this information -- assuming they improperly
12 took this information -- where were they located?

13 MR. MELODIA: North Carolina, Your Honor, and the
14 suit against them, which is a verified complaint in front of
15 Your Honor as an exhibit, is in North Carolina. Everything
16 about every employee, including, by the way, the people who
17 took the phone calls in response to the letters, were in
18 North Carolina. At most there was a backup system in
19 Phoenix. There was nothing in California. Our affidavit on
20 that point, Exhibit D to our reply, is very clear.

21 THE COURT: So the issue becomes: Does North
22 Carolina have a greater material interest in enforcing and
23 using North Carolina law when wrongful conduct occurs in
24 North Carolina, or does California have a materially greater
25 interest when wrongful conduct occurred in North Carolina?

1 MR. MELODIA: Correct.

2 THE COURT: Or both places, because it was shipped
3 out there. But it initially started here and then went out
4 there.

5 MR. MELODIA: Absolutely. The breach occurred
6 here. Your Honor, a couple --

7 THE COURT: No. No, you're out of time.

8 MR. MELODIA: No, I have three minutes. Your
9 Honor --

10 THE COURT: All right. I gave them two extra
11 minutes. I'll give you one.

12 MR. MELODIA: Thank you.

13 MS. FORD: A few seconds?

14 THE COURT: All right, I'll do this: I'll give
15 you two minutes and give you an extra 30 seconds. I'll
16 watch it.

17 MR. MELODIA: Deal or no deal. Deal, Your Honor.
18 (Laughter)

19 Your Honor, in the no-alternative argument, let me
20 give you this. These are just this morning, as you'll see
21 from the 6:14 a.m. line on the e-mail --

22 THE COURT: I was up at that time too.

23 MR. MELODIA: -- here are three competitors, Your
24 Honor, with websites which have no arbitration clause and no
25 class action waiver in the same business as LendingTree.

1 That's a specious argument.

2 Additionally, *AmEx*, the Second Circuit case that
3 was presented to you, is extraordinarily unique. It will be
4 interesting to see if it's reconsidered en banc, but it is
5 clearly limited --

6 THE COURT: It's been out four days -- no, six
7 days.

8 MR. MELODIA: -- to an antitrust context. And it
9 does talk about a federal substantive law. It has no
10 bearing certainly on the *Tillman* analysis.

11 LendingTree does contest that there is -- that we
12 would lose in California. And we specifically contest that
13 there is no --

14 THE COURT: But you admit your case would be
15 tougher in California --

16 MR. MELODIA: It would be tougher in California.

17 THE COURT: -- because contracts of adhesion are
18 not enforceable.

19 MR. MELODIA: But it would not be tougher against
20 these plaintiffs. The plaintiffs you have in front of you,
21 it would not be tougher at all because California would not
22 protect them in this case. I think that is clear.

23 The final point is who has the burden. Tracy
24 started with the point that we have the burden. We don't
25 have the burden.

1 THE COURT: Well, this is your motion. You do
2 have the burden here.

3 MR. MELODIA: We do not have the burden. The
4 burden is always on -- under the FAA and/or the Supreme
5 Court case law, the burden is always on the person
6 contesting the enforceability of the arbitration clause.
7 Similarly, under Ninth Circuit authority, including the
8 *Ramkissoo* decision recently in the Ninth Circuit, it's
9 clear, and under Supreme Court case law, the *Bremen* case
10 from 1972, is the plaintiffs, who have a heavy burden to
11 establish a ground upon which the clause is unenforceable.

12 THE COURT: I agree with you they are contesting
13 it, your agreement. Thank you very much.

14 Ms. Ford.

15 MS. FORD: Your Honor, just a few very quick
16 points.

17 Mr. Melodia handed up documents that just
18 evidences that there's a need for discovery. Page 14 of the
19 Garcia-Bradley plaintiffs brief; pages 34, 35 of the other
20 plaintiffs' brief cites numerous cases allowing for
21 discovery.

22 THE COURT: Well, that really goes to choice of
23 law, doesn't it?

24 MS. FORD: No, Your Honor, that --

25 THE COURT: California allows it and North

1 Carolina really doesn't.

2 MS. FORD: In *Tillman* there were depositions. In
3 *Tillman* there was discovery.

4 THE COURT: Well, *Tillman* was litigation.

5 MS. FORD: In *Kucan* the North Carolina appellate
6 court remanded to examine the facts which have the
7 opportunity for discovery. I point Your Honor to the
8 *Terminix* case, a recent decision out of Arkansas, where the
9 court issued a motion for reconsideration because it said it
10 was error to not allow discovery.

11 So just the fact that documents are being handed
12 up, it just shows that we should have the opportunity to
13 fully flush out things through discovery.

14 THE COURT: Well, I mean, you have both made your
15 arguments. You have said that all the competitors have
16 binding arbitration clauses. They said otherwise. The
17 Court will weigh that in its analysis as to whether there's
18 a need for discovery or not. We hear both side's arguments
19 on that.

20 All right. It's now 10:17. We'll recess for 15
21 minutes, and we will come back and I will either give you an
22 answer or not give you an answer. The great thing about
23 being a judge is I get to tell you when I'm going to tell
24 you the answer. All right. So we will be in recess.

25 (Recess taken.)

1 THE COURT: Excuse me while I get organized here.

2 After reviewing the pleadings, evidence and case
3 law submitted by both parties, and after hearing oral
4 argument, the Court is prepared to issue its oral order on
5 defendant LendingTree's motion to stay and compel
6 arbitration.

7 I want to add for the students that some of the
8 things the Court will orally rule on today you probably did
9 not hear in argument, but all of this has been well briefed
10 by the parties.

11 The ultimate issue before the Court is whether the
12 arbitration clause in the terms of use is an enforceable
13 agreement to arbitrate, valid and irrevocable under the
14 Federal Arbitration Act, or unconscionable under state law
15 principles, and, therefore, unenforceable. The threshold
16 question then is which state's law the Court must apply to
17 determine the issue of unconscionability. In addition to
18 the arbitration clause, the terms of use contain a
19 choice-of-law clause that reads, quote, "This agreement
20 shall be subject to and construed in accordance with the
21 laws of the state of North Carolina." Close quote.

22 LendingTree argues that this choice-of-law clause
23 is determinative of the conflicts issue and that North
24 Carolina applies. Plaintiffs, however, argue that the
25 applicable conflicts principles mandate the application of

1 California and Illinois law.

2 It is a general rule of multidistrict litigation
3 that, quote, "when considering questions of state law the
4 transferee court must apply the state law that would have
5 applied to the individual cases had they not been
6 transferred for consolidation." And I cite a decision,
7 which I might have a hard time reading the name but I'll do
8 the best I can -- *In re: Temporomandibular Joint (TMJ)*
9 *Implants Products Liability Litigation*, that's
10 T-E-M-P-O-R-O-M-A-N-D-I-B-U-L-A-R, 97 F.3d 1050. Pinpoint
11 cite 1055, Eighth Circuit 1996. This rule applies to
12 choice-of-law rules because these rules are part of a
13 state's substantive law. Both California and Illinois take
14 the same approach to choice of law, that found in
15 Restatement (Second) of Conflicts, Section 187 (2).

16 Under that test the law chosen by the parties will
17 be applied unless either (1) the chosen state has no
18 substantial relationship with the parties and there's no
19 other reasonable basis for the parties' choice; or (2)
20 application of the chosen law would be contrary to a
21 fundamental policy of a state which has a materially greater
22 interest than the chosen law, and whose state's law would
23 have applied but for the choice-of-law clause.

24 As to the first element, North Carolina clearly
25 has a substantial relationship with the agreement and the

1 events surrounding the alleged misappropriation of
2 information because the employees improperly acted within
3 North Carolina.

4 Plaintiffs, however, argue that the application
5 under the North Carolina law would lead to the application
6 of a particular provision of the arbitration clause, a class
7 action waiver. Plaintiffs contend that the class action
8 waiver in the agreement is unconscionable under California
9 law; that California has a fundamental policy against
10 unconscionable class action waivers, and that California has
11 a materially greater interest in this litigation than North
12 Carolina. This Court disagrees.

13 First: The Court is of the opinion that the class
14 action waiver is not unconscionable under California law.
15 The California Supreme Court has made it clear that not all
16 class action waivers are unconscionable. See *Discover Bank*
17 *v. Superior Court*, 113 E.3d 1100, pinpoint cite 1108-10
18 California 2005.

19 The three-part test for unconscionable class
20 action waiver is (1) whether the agreement is a consumer
21 contract of adhesion drafted by the party that has as a
22 superior bargaining power or powers. (2) whether the
23 agreement occurs in a setting in which disputes between the
24 contracting parties predictably involve small amounts of
25 damages; and (3) whether it is alleged that the party with

1 the superior bargaining power has carried out a scheme to
2 deliberately cheat large numbers of consumers out of
3 individually small sums of money.

4 The first element is unquestionably met as
5 LendingTree had superior bargaining power and would not have
6 negotiated terms with the plaintiffs.

7 The second element, however, is not met.
8 Plaintiffs argue that the damages in the instant case are
9 small, mostly involving statutory damages under the Fair
10 Credit Reporting Act. This argument ignores the word
11 "predictably." To argue that damages were predictably small
12 because they are, in fact, small is the classic fallacy of
13 affirming the consequent. The paradigmatic setting of
14 predictably small damages is a credit card agreement that
15 provides for late fees. Once again I cite *Discover Bank*,
16 113 P.3d 1103.

17 The agreement to arbitrate this case did not occur
18 in such a narrow setting. The agreement itself is broadly
19 stated to cover, quote, "any claim or controversy arising
20 out of or relating to the use of this website to the goods
21 or services provided by LendingTree, or to any acts or
22 omission for which you may contend LendingTree is liable."
23 Close quote.

24 The setting could have therefore have included a
25 full range of claims, including contract claims such as

1 breach of express or implied warranty, various tort claims
2 such as negligence, fraud, and unfair and deceptive trade
3 practices, as well as federal consumer protection statutes,
4 such as the Fair Credit Reporting Act.

5 Even assuming a setting as narrow as the Fair
6 Credit Reporting Act, the fact that the Act explicitly
7 allows for punitive damages would seem to negate the element
8 of predictably small damages. That's found at 15 United
9 States Code, Section 1681n (a) (1) (B). The second element
10 is therefore not met.

11 Similarly, plaintiffs' allegations fall short of
12 satisfying the third element. While it is true that under
13 California law a summary allegation of a deliberate scheme
14 to cheat consumers is sufficient, plaintiffs' allegations
15 include no such scheme. Instead, plaintiffs' complaints all
16 include allegations that LendingTree deliberately or
17 recklessly failed to maintain the appropriate safeguards for
18 plaintiffs' information. This allegation, even when viewed
19 in the light most favorable to plaintiffs, does not equate
20 to a deliberate scheme to cheat consumers out of
21 individually small sums of money.

22 The failure to maintain adequate safeguards and
23 engaging in a deliberate scheme to cheat consumers are
24 entirely different allegations. Plaintiff's have alleged
25 the former, not the latter. Thus the third element not

1 satisfied.

2 Because plaintiffs can satisfy neither the second
3 element, that damages were predictably small, nor the third
4 element, that LendingTree carried out a scheme to
5 deliberately cheat consumers out of small sums of money,
6 plaintiffs have failed to establish that a class action
7 waiver is unconscionable under California law.

8 Even if the class action waiver were
9 unconscionable and did violate a fundamental policy of
10 California, it is abundantly clear to this Court that
11 California's interest in this litigation is not materially
12 greater than North Carolina's.

13 California courts consider several factors to
14 determine which state's interest is greater, including the
15 domicile of the parties, place of contract formation, the
16 place where the wrong occurred, and whether the applicable
17 law is California statutory law. This Court cites *Klussman*
18 *v. Cross Country Bank*, 134 Cal.App. 4th 1283, pinpoint cite
19 1299 . 2005.

20 Most significantly, none of the plaintiffs are
21 California residents. Plaintiffs have joined various
22 California corporations as defendants, but none of these
23 defendants have appeared, and plaintiffs have not initiated
24 default proceedings against those -- that there are some
25 proceedings continuing in those actions.

1 It is clear that LendingTree is the key defendant,
2 and LendingTree is based in North Carolina. The last stage
3 of contract formation was plaintiffs clicking and checking
4 of the box indicating consent to the terms of use. This
5 presumably took place at plaintiffs' residences which are in
6 Florida, Georgia, Nevada, New York, Oklahoma, Pennsylvania,
7 Utah and Virginia, but not California.

8 The parties dispute the place of the wrong, which
9 was either California, where the confidential information
10 was allegedly sold, or North Carolina where LendingTree
11 allegedly failed to maintain adequate safeguards.

12 Plaintiffs have alleged violations of certain
13 California statutes, but it is clear from the complaints
14 that an alleged violation of the Fair Credit Reporting Act
15 is the predominant claim. Plaintiffs argue that all the
16 factors showed that North Carolina has, quote, "no greater
17 interest than California," close quote. This is a
18 misstatement of the test. Plaintiffs must show that
19 California has a materially greater interest than North
20 Carolina in order to override the choice-of-law clause.
21 They have not done so.

22 Accordingly, under the Restatement, Section
23 187(2) test, the Court must enforce the parties' choice of
24 North Carolina law. This analysis applies even more so to
25 Illinois, a state with even less of a relationship to this

1 case.

2 Turning now from the choice-of-law analysis to the
3 substantive law of unconscionability, North Carolina law
4 requires findings of both procedural and substantive
5 unconscionability.

6 Prior to the multidistrict panel's consolidation
7 in this case, the Court heard oral argument regarding the
8 Spinozzi plaintiffs and held that the agreement to arbitrate
9 was not unconscionable under North Carolina law. The
10 plaintiffs now argue that this holding was in error,
11 rehearsing many of the points already addressed and disposed
12 of by the Court in its prior order.

13 The plaintiffs novel argument supported by
14 affidavit is that several of the plaintiffs lack the
15 economic means to arbitrate and that this prohibitive
16 expense makes the agreement to arbitrate substantively
17 unconscionable.

18 Leaving aside the merits of this argument, which
19 the Court considers far from conclusive, the plaintiffs are
20 still unable to make a showing of procedural
21 unconscionability. Unlike California, the contract of
22 adhesion is not prima facie procedurally unconscionable
23 under North Carolina law. Notably, this case is completely
24 lacking in the other indicia of procedural unconscionability
25 discussed by the North Carolina Supreme Court in *Tillman v.*

1 *Commercial Credit Loans, Inc.* 655 S.E.2d 362, North Carolina
2 2008.

3 There was no unfair surprise. Plaintiffs had all
4 the time they needed to read and understand the terms of
5 use. Similarly, there was no lack of meaningful choice.
6 Plaintiffs had any number of other options for obtaining
7 mortgage loan services, including other loan comparison
8 services on the Internet.

9 Thus, the Court holds, as it did in the Spinozzi
10 cases, that the agreement to arbitrate is not
11 unconscionable. The agreement is therefore valid,
12 irrevocable, and enforceable under the Federal Arbitration
13 Act.

14 The plaintiffs have recently called the Court's
15 attention to the Second Circuit's holding in *In re:*
16 *American Express Merchants' Litigation*, No. 06-1871-CV, 2009
17 West Law 214525, Second Circuit, January 30th, 2009.

18 In that case the Second Circuit stated that it
19 would, quote, "evaluate arbitration clauses containing class
20 action waivers under the federal substantive law of
21 arbitrability." Close quote, *id.* at slip opinion page 9,
22 rather than under a state -- rather than under a state law
23 revocation doctrine such as unconscionability. In so doing,
24 the Court held that the class action waiver with which it
25 was presented was unenforceable because if enforced the

1 waiver would grant the defendant, American-Express, de facto
2 immunity from federal antitrust laws.

3 Crucial to the court's holding was an affidavit
4 filed by an economics expert detailing, quote, "the
5 complexity and analytical intensity of an antitrust study."
6 *Id.* at slip opinion page 13.

7 The expert concluded that, quote, "even a
8 relatively large -- small economic antitrust study would
9 cost at least several hundred thousand dollars, while a
10 larger study could easily exceed \$1 million," *id.*

11 The Court declines to apply the reasoning of *In*
12 *re: American Express* to invalidate the arbitration and
13 class action waiver clauses for two key reasons.

14 First, and most simply, *In re: American Express*
15 is not binding on this Court. As the transferee court for
16 actions originating in the Ninth, Tenth, Seventh and Fourth
17 Circuits, this Court is not bound by Second Circuit
18 decisions. None of the applicable circuits have applied the
19 theory espoused by the Second Circuit in *In re: American*
20 *Express*.

21 Second, even should the Court find *In re:*
22 *American Express* persuasive, the facts of that case are
23 markedly different than those of this case. The court there
24 went to great pains discussing complexity and expense of an
25 antitrust action. It is that extreme expense that led the

1 Court to conclude that a class action is the only way to
2 ensure liability for antitrust violations. An action
3 brought under the Fair Credit Reporting Act is simply not
4 comparable in either legal or factual intensity. Thus,
5 enforcement of the arbitration clause and class action
6 waiver in this case does not amount to a de facto grant of
7 immunity.

8 Finally, the Court does not believe that
9 additional discovery is appropriate. Congress's reasons for
10 codifying a national policy favoring arbitration to ease the
11 burdens and expense of traditional litigation for parties
12 and the courts would be thwarted by allowing every case with
13 an arbitration clause to be derailed by unconscionability
14 discovery. The Court cites *Southland Corp. v. Keating*, 465
15 U.S. 1; *Galt v. Libbey-Owens-Ford Glass Company*, 376 F.2d
16 711, pinpoint cite page 714, Seventh Circuit, 1967.

17 Accordingly, defendant LendingTree's motion to
18 stay and compel arbitration is granted.

19 I believe plaintiffs had some other issues they
20 wanted to raise.

21 MS. REZVANI: Yes, Your Honor. With respect to
22 the remaining defendants, I know Your Honor just read in
23 your order they hadn't entered an appearance, and they
24 haven't. But as I had mentioned in oral argument, they had,
25 in fact, entered appearances by answering. And so those

1 cases still remain live.

2 So I would like to -- and I know we're not in your
3 normal courtroom, but we probably should set up some kind of
4 a status conference. We could get MDL moving with respect
5 to the remaining defendants because we do need to start
6 setting some schedules, deadlines and that. And I would
7 like to reach out to defense counsel for those other
8 defendants in order to make that suggestion. But I wanted
9 to raise that with you as to scheduling.

10 THE COURT: Is there any third-party defendant who
11 has not filed an answer?

12 MS. REZVANI: Let me look at my notes.

13 THE COURT: Because if they are in default, I
14 would strongly suggest you seek entry of default from the
15 clerk and then move for a default judgment.

16 MS. REZVANI: Southern California Marketing is the
17 one that is in default, so that was the only one we could
18 have a --

19 THE COURT: All right. So we can --

20 MS. REZVANI: We mentioned Sage's answered, but
21 they are looking for new counsel. And Newport Lending,
22 we're going to have to amend the complaint to name the right
23 entity and serve that entity.

24 THE COURT: All right. Well, as to those in
25 default, then I would procedurally ensure they are in

1 default before they come in and file something in the last
2 minute -- well, they are outside their time, but they can
3 argue excusable neglect under the Federal Rules of Civil
4 Procedure. And as to having to amend your complaint -- have
5 they filed a motion to dismiss?

6 MS. REZVANI: They have not.

7 THE COURT: Just from your reading of their
8 answer, you know that --

9 MS. REZVANI: Well, Newport Lending Corp has not
10 answered. In conversations with their counsel, we have
11 noted that they were the wrong entity. And I think
12 LendingTree made the same mistake when they sued them in
13 California. So I believe they will have to amend their
14 complaint as well in California to name the right entity,
15 and then we can start from scratch.

16 THE COURT: Let's just shore up who is in this
17 case. And as soon as we have a joinder of the issues of the
18 third-party defendants -- and we'll overcome any Rule 12
19 motions, of course, and this Court does not delay discovery
20 for 12(b)(6) motion. We delay discovery on most of the
21 other motions where you're dealing with jurisdictional
22 hurdles, but 12(b)(6) are basically a step towards summary
23 judgment. So if there's a 12(b)(6) motion filed by one of
24 the third-party defendants, we would still be directing them
25 into discovery.

1 MS. REZVANI: Okay.

2 THE COURT: So just shore up the case as to the
3 third-party defendants. And then once we know who the
4 parties are, then we can set a discovery schedule. What I
5 suggest is you call Mr. Baker directly on that and we will
6 facilitate the conference call for an initial attorneys
7 conference.

8 MS. REZVANI: Okay. Thank you.

9 THE COURT: Anything else?

10 MS. REZVANI: That was my only housekeeping
11 matter.

12 THE COURT: Let me come down and thank all the
13 counsel.

14 THE CLERK: One more matter we need to attend to
15 before.

16 MS. NICHOLSON: Judge Whitney, we just have a gift
17 for you.

18 THE COURT: Is this bribery?

19 MS. NICHOLSON: Thank you for coming to hold this
20 at the law school. We appreciate, your initiative on
21 getting it taken care of. And we also obviously want to
22 thank all of the attorneys for allowing us to host your
23 motions, and we hope that you'll come back and see us.

24 THE COURT: This is great. Thank you. Thank you
25 all. Thank you very much.

(Court adjourned at 11:00.)

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**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA**

CERTIFICATE OF REPORTER

I, JOY KELLY, RPR, CRR, certify that the foregoing
is a correct transcript from the record of proceedings in
the above-entitled matter.

S/JOY KELLY

**JOY KELLY, RPR, CRR
U.S. Official Court Reporter
Charlotte, North Carolina**

Date _____